Nos. 01-20-00004-CR and 01-20-00005-CR

In the Court of Appeals
For the First District of Texas
At Houston

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Nos. 1657519 and 1657521
In the 338th District Court
Of Harris County, Texas

———♦———

***Ex parte* Joseph Eric Gomez**
Appellant

———♦———

State's Appellate Brief

———♦———

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Oral Argument Requested

Statement Regarding Oral Argument

The appellant requested oral argument, as does the State.

Identification of the Parties

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Appellant:

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Counsel for the Appellant:

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— Counsel on appeal

Habeas court

Ramona Franklin
— Presiding judge

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Statement of the Case

The appellant was indicted for burglary of a habitation and assault of an individual with whom he had a dating relationship by impeding breath. (1 Supp. CR 14; 2 Supp. CR 19).[1] He filed a pretrial application for habeas corpus relief, alleging his bail was too high. (1 CR 4-9).[2] After a hearing, the trial court denied relief. (2 RR 23-24). The trial court certified the appellant's right of appeal and the appellant filed notices of appeal. (1 CR 68, 69; 2 CR 68, 69).

Statement of Facts

When police arrived at the crime scene, the complainant told officers

> as she woke up, the [appellant] was crouching near her bed. He was wearing all black, wearing a black mask. When she saw him, he got on top of her and start[ed] choking her. Her sister rushed into the room, pushed him off of her, and then he fled the residence and he was located by officers not far from the residence.

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[1] The State will describe the clerk's records for these two cases as though they were sequential volumes. The record for No. 1657519 (the burglary case) will be 1 CR and 1 Supp. CR. The record for No. 1657521 (the assault case) will be 2 CR and 2 Supp. CR. When documents are identical in the records the State will cite to 1 CR and 1 Supp. CR.

[2] For whatever reason, the writ application appears in the original clerk's records and then twice in the supplemental records. (*See* 1 Supp. CR 23-28, 78-84). There's also a shorter "Application for Writ of Habeas Corpus Seeking Bail Reduction," filed three days before the other application, in the supplemental records. (*See* 1 Supp. CR 15-16).

> The complainant told [the responding officer] that she located inside the side room of her residence a couple of bottles of urine and some of [the appellant's] personal affects, and that led the complainant…to the reasonable conclusion that [the appellant] was lying in wait hiding in the residence for some time.

(1 RR 4).

After his arrest on charges of burglary and assault, by strangulation, of a family member, the State requested that bail be set at $100,000 in each case. (1 CR 19, 22). The hearing officer before whom the appellant first appeared set bail at $25,000 for the burglary charge and $15,000 for the assault case. (1 CR 19, 22). Roughly twenty-nine hours later, before any other court appearance, the appellant obtained a bail bond for both cases. (1 Supp. CR 9-10; 2 Supp. CR 14-15).

Soon after, the appellant made his first appearance before the district judge to whose court his case had been assigned. (1 Supp. CR 146; 1 RR 4). That judge ordered the defendant rearrested and ordered him to obtain new bonds to total $75,000 for each case. (1 Supp. CR 8; 2 Supp CR 13).

A few days later, counsel for the appellant appeared and asked the trial court to reinstate the original bail amounts. (2 RR 13). The trial court denied this motion. (2 RR 13).

The appellant applied for a writ of habeas corpus, alleging he was being held illegally because the trial court was without authority to require him to obtain another bond. (1 CR 4-9). At the writ hearing, the appellant argued that, under Code of Criminal Procedure Article 17.09, once he made bail the trial court could raise the amount of the bail only with "good and sufficient cause," which did not exist in this case. (2 RR 18-19). The appellant also argued he was denied due process because he did not have notice the trial court would review the amount of his bail, and he was denied the right to counsel of his choice because the trial court had appointed a lawyer for him, even though he wanted to retain a different lawyer. (2 RR 19-20). Finally, the appellant argued that to whatever degree the trial court relied on the prosecutor's recitation of the facts of the alleged offense as a basis to raise the appellant's bail, that violated the Rules of Evidence. (2 RR 20-21).

The State responded that Article 17.09 gave the trial court the authority to rearrest a defendant and require him to post another bond anytime it determined the current bond was insufficient. (2 RR 21-22). The State also argued that a trial court's decision to review the amount of bail is not a "formal hearing," thus defendants are not entitled to a lawyer. (2 RR 21-22).

The trial court denied relief. (2 RR 24). It explained it believed its action was authorized by Article 17.09, which allows a court to rearrest a defendant and require him to obtain another bond "whenever, during the course of the action, the judge … in whose court such action is pending finds that the bond is … insufficient in amount…." (2 RR 24); TEX. R. CRIM. PROC. art. 17.09 § 3. The court described the earlier proceeding as a "bail review hearing." (2 RR 24). The trial court said that at that hearing it "heard the probable cause in this [case] and deemed the original bond was insufficient." (2 RR 24).

Summary of the Argument

Although this is a bail appeal, the appellant is not litigating the amount of his bail. Instead, he complains about how it was set.

In his first point he claims the trial court lacked "good and sufficient cause" to rearrest him and require him to get a new bond. But the plain text of the statute allowed the trial court to do this if the trial court believed the amount of bond was "insufficient." The trial court explicitly stated that was its reason.

The appellant's second point is multifarious, alleging several distinct constitutional violations. He alleges the trial court violated due process by not giving him notice of the hearing. But a trial court need

not conduct a hearing or provide notice to use the Article 17.09 procedure. The appellant claims the trial court violated his right to counsel of his own choosing, but the appellant admits he had not retained a lawyer at the time of the proceeding, and nothing in the record shows he told the trial court he wanted to retain a lawyer. Finally, the appellant claims the trial court erred in hearing inadmissible evidence. But the Article 17.09 proceeding was not a "hearing" to which the Rules of Evidence apply.

Reply to Point One

The plain language of Article 17.09 states that the trial court's determination that the amount of bail is insufficient is, by itself, adequate reason to for rearrest a defendant and require him to obtain a new bond.

Code of Criminal Procedure Article 17.09 controls the trial court's management of bail during a criminal trial. Section 2 states the general rule: "When a defendant has once given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same action except as herein provided." TEX. CODE CRIM. PROC. art. 17.09 § 2. Section 3, though, establishes several exceptions to this rule:

> Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

TEX. CODE CRIM. PROC. art. 17.09 § 3.

The appellant's argument is that there was no "good and sufficient cause," as that term has been defined in the case law, to require him to give another bond. (Appellant's Brief at 13-19). The appellant claims that "no appellate decision or other law has ever authorized the trial court to act in the manner and fashion that it did so here in revoking [the appellant's] bonds."

If true, that's likely because the plain terms of Article 17.09 authorize what occurred here. The statute authorizes a trial court to rearrest a defendant and require him to get another bond if "the judge … in whose court such action is pending finds the bond is … insufficient in amount." What happened here is that the judge in whose court the appellant's action is pending found the appellant's original bond was in-

sufficient in amount. (2 RR 24). The judge ordered the appellant rearrested and required him to give another bond in an amount she found proper. That follows the statutory requirements.

The requirement for an "other good and sufficient cause"[3] applies only when the trial court does not find the amount of bail insufficient but has the defendant rearrested for other reasons. For instance, in *Meador v. State*, 780 S.W.2d 836, 837 (Tex. App.—Houston [14th Dist.] 1989, no pet.), the trial court rearrested the defendant and increased his bail because the defendant showed up to court a few minutes late and had failed to hire a lawyer. The Fourteenth Court reversed because this was not a "good and sufficient cause." Nothing in the case suggests the trial court found the defendant's bail insufficient or otherwise defective.

In *Ex parte King*, 613 S.W.2d 503, 504-05 (Tex. Crim. App. 1981), the record contained no explanation from the trial court why it rearrested the defendant and increased his bail, but the record seemed to show it was prompted by a motion for continuance from the defense. The Court of Criminal Appeals held that was not a "good and sufficient

[3] As a matter of grammar, the statute's use of the phrase "*other* good and sufficient cause" strongly implies that the causes listed previously—such as a trial court's belief that the amount of bail is insufficient—are "good and sufficient causes."

cause." Nothing in the case suggests the trial court found the defendant's bail insufficient or otherwise defective.

The State can find no other cases in which a court reversed a trial court's decision to increase bail due to lack of a "good and sufficient cause." The only other appellate reversal the appellant cites is *Queen v. State*, 842 S.W.2d 708 (Tex. App.—Houston [1st Dist.] 1992, no pet.). (Appellant's Brief at 17). But that case related to a trial court's order revoking bail and holding the defendant without bail entirely. *Queen*, 842 S.W.2d at 712. The complete denial of bail requires specific procedures and can occur only in certain constitutionally enumerated situations. *See* TEX. CONST. art. I §§ 11, 11a, 11b, 11c. The *Queen* court's holding turned on the trial court's general lack of authority to deny bail. Article 17.09 does not address the denial of bail, thus *Queen*'s brief discussion of the "good and sufficient cause" standard is off-topic dicta.

Allowing trial courts to require defendants to get another bond based on no more than a belief that the current bond is too low may seem like it leaves courts unaccountable, but that's not so. A defendant required to a post a second bond under Article 17.09 will still have the same ability to seek a reduction, first by motion and then by habeas corpus, as a defendant who was unable to make his original bail amount.

For instance, in *Ex parte Emery*, 970 S.W.2d 144 (Tex. App.—Waco 1998, no pet.), on the State's motion the defendant was rearrested and her bail increased. She applied for habeas relief, and the Tenth Court held the trial court erred in denying relief because the increased amount was excessive. *Emery*, 970 S.W.2d at 146. The opinion did not discuss whether the cause for her rearrest and bail increase was "good and sufficient."

Nor does allowing trial courts to increase bail amounts introduce more discretion into the bail system. Trial courts already have extremely broad discretion in determining the amount of bail. Allowing them to adjust the amount based on a belief that bail is insufficient merely allows them to correct their own mistakes, or what they perceive to be the mistakes of other magistrates who have handled the case.

Often, the initial bail amounts will be set by someone other than the trial judge. Here, a hearing officer, not the trial judge, set the initial bail. The hearing officer had that authority, but once the case was assigned to the trial court the hearing officer left the picture and it became the trial court's responsibility to ensure the safety of the community and the defendant's presence at trial. Article 17.09 recognizes this reality by placing the authority to determine whether a defendant's bail is too high

or too low with "the judge or magistrate in whose court such action is pending."

Under the plain text of Article 17.09, if the trial court determines the defendant's bond is insufficient it can order the defendant rearrested and require him to get another bond. That's what happened in this case. Because the trial court's actions were authorized by statute, it was within its discretion to deny habeas relief and this Court should reject the appellant's first point.

Replies to Point Two

In a multifarious point, the appellant raises three distinct complaints about the trial court's procedures in arresting him and requiring him to get another bond. He complains the trial court violated his right to due process by not providing him with notice of the hearing. (Appellant's Brief at 19-21). He then complains the trial court violated his right to counsel by appointing a lawyer for him rather than waiting for him to get retained counsel. (Appellant's Brief at 21-24). Finally, he complains that the trial court violated the Rules of Evidence by having the prosecutor read the probable cause statement. (Appellant's Brief at 24-26). The State will address these complaints in turn.

The appellant was not entitled to notice because this was not a "hearing." The appellant cites no authority for the proposition that he's entitled to notice before being arrested.

The appellant claims he had a right to notice before the trial court had him rearrested. Neither in the trial court nor in this Court has the appellant cited any authority that directly supports this claim. The State has found no state or federal authority for the proposition that due process requires notice before a trial court may modify the conditions or amount of a defendant's bail.

The closest the appellant comes to supporting his claim is citing some unsupported dicta in two Fourteenth Court cases about revoking an appeal bond. In *Robinson v. State*, 700 S.W.2d 710 (Tex. App.—Houston [14th Dist.] 1985, no pet.), the trial court revoked the defendant's appeal bond. He appealed this ruling, alleging, among other problems, that the State's motion to revoke failed to give him notice of the allegations relied on for revocation. The Fourteenth Court noted that nothing in the relevant statute "requires that the State or the trial court give notice or that the trial court hold a hearing prior to revoking bail." *Robinson*, 700 S.W.2d at 713 (discussing TEX. CODE CRIM. PROC. art. 44.04(c)).

The Fourteenth Court went on, however to note that an unpublished Court of Criminal Appeals case handed down a month earlier held that due process required a defendant to have notice and an opportunity to be heard before a trial court could deny an appeal bond. *Ibid.* Without discussing the reasoning of that case, the *Robinson* court said it believed the same protections would apply to revocation of an appeal bond. But the court affirmed the trial court after finding that Robinson had received adequate notice, thus the discussion of due process was unnecessary for the court's decision—*i.e.*, dicta.

In 1999, the Fourteenth Court revisited this subject, this time sitting en banc. In *Smith v. State*, 993 S.W.2d 408 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd)(en banc), the defendant filed a habeas petition challenging a condition of his appeal bond. At the hearing, the trial court denied relief and then revoked his bond altogether. The defendant appealed, complaining, among other things, that he did not have notice that the purpose of the hearing was to revoke his bond. This claim seems to have stemmed from *Robinson*.

The Fourteenth Court noted that the unpublished case *Robinson* "exclusively" relied on had been withdrawn, causing the court to "question the continuing validity of *Robinson*." *Smith*, 993 S.W.2d at 412.

Without citation to any other authority, though, the court stated it "still agree[d] with the Robinson court that due process protections of notice and a reasonable opportunity to be heard attach to an appeal bond revocation based on an appellant's liberty interest." *Ibid*. But the court then held that the requirements of due process had been fulfilled in that case, meaning, again, the due process holding was not essential to the outcome of the case.

What should this Court make of *Robinson* and *Smith*? Their purported holdings have no basis in the law. They are in no way binding on this Court, and their lack of reasoning makes it questionable whether they should even be considered persuasive.

Importantly, they are distinguishable from this case. In the context of an appeal bond, revocation requires a hearing with evidence. *See* TEX. CODE CRIM. PROC. art. 44.04(c)(requiring "a finding by the court on a preponderance of the evidence of a violation of a condition" to justify revocation). Similarly, most of the time the revocation of a pretrial bond requires a hearing with evidence.[4] *See* TEX. CODE CRIM. PROC. art. 17.40(b).

[4] This is because revocation involves determining whether the defendant violated conditions of the bond, which necessarily requires a hearing to present extraneous evidence. The initial setting of the bond amount, or the setting of a new bond

But, the appellant's inaccurate language notwithstanding, there was no revocation here. Instead, the appellant was rearrested and required to a get another bond. This procedure is like the original arrest and setting of bail, which does not require notice or any sort of evidentiary finding. This procedure is not a hearing requiring notice or evidence.

There are several reasons in the statutes to believe a modification of bail under Article 17.09 does not require a hearing with notice and evidence. First the statute itself does not mention any hearing, just the trial court's conclusions. Second, the statute says the trial court may use this procedure "in term-time or in vacation." The trial court would not be conducting hearings while in vacation.

Third, other statutes for modifying bail mention hearings. When a judge seeks to reduce the amount of bail for defendants charged with certain offenses, the court must provide notice to the parties, and, if requested, "an opportunity for a hearing concerning the proposed bail reduction." TEX. CODE CRIM. PROC. art. 17.091. Holding a defendant without bail after violation of certain conditions of pretrial release also

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amount under Article 17.09, however, requires no more than the bare allegations, although a magistrate can rely on extrinsic evidence.

requires a hearing with evidence. TEX. CONST. art I §§ 11b, 11c. The lack of a reference to hearings in Article 17.09 seems intentional.

Just because a defendant has no right to notice for a proceeding at which he is ordered to give a new bond does not mean he has no procedural rights. But just like the original setting of bail, the defendant's procedural protections take place afterward, through a motion to reduce bail and, if necessary, an application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. art. 17.33 (allowing confined defendant to request hearing to reduce bail); *see Kozacki v. Knize*, 883 S.W.2d 760, 763 (Tex. App.—Waco 1994, no pet.)(conditionally granting writ of mandamus forcing trial court to hold hearing on motion to reduce bail).

The most on-point case for this proposition is *Ex parte Shockley*, 683 S.W.2d 493 (Tex. App.—Dallas 1984) *pet. dism'd* 717 S.W.2d 922 (Tex. Crim. App. 1986). There, the defendant was at liberty on $10,000 appeal bond. *Shockley*, 683 S.W.3d at 494-95. The State filed a written motion to hold the defendant without bail, but at the hearing made an alternative motion to increase bail to $250,000. The trial court instead set bail at $50,000.

The defendant appealed, complaining he had not received notice of a hearing to increase his bail. In overruling this point, the Fifth Court

pointed to the language of Article 44.04(d), which, like Article 17.09, allows the trial court to increase or decrease bail sua sponte. Because of this authority, "the [trial] court is not required to give the defendant either notice or a hearing." The Fifth Court pointed out that even without notice or a hearing the defendant's due process rights could be fully vindicated by a motion to reduce bail, and, if necessary, a habeas application.

The appellant has produced no authority showing he had a right to notice before being arrested and ordered to get a new bond. The bail statutes give several reasons to believe no notice or hearing was required. The trial court did not err in denying habeas relief and this Court should affirm that decision.

The appellant had not retained counsel of his choosing when he was rearrested, thus the trial court could not have violated his right to have that counsel present.

When the appellant was rearrested and required to give a new bond, the trial court appointed a lawyer to represent him for that proceeding. (1 RR 5). In his habeas application and now on appeal the appellant alleges this violated his right to counsel of his own choosing.

The appellant admits that at the time of the proceeding he had not retained a lawyer. (1 CR 36). Neither in his affidavit nor in any exhibit has the appellant claimed he alerted the trial court to the fact that he had a lawyer or would like to retain his own lawyer. "While the right to counsel is a 'waivable only' right, the right to specific counsel is not." *McGee v. State*, 124 S.W.3d 253, 257 (Tex. App.—Fort Worth 2003, pet. ref'd). By not alerting the trial court to his desire to have a particular lawyer represent him, the appellant forfeited that right. *See Biggers v. State*, No. 01-08-00299-CR, 2009 WL 5174268, at *4 (Tex. App.—Houston [1st Dist.] Dec. 31, 2009, pet. ref'd)(mem. op. not designated for publication)(when defendant is represented by appointed counsel, formal complaint or objection required to preserve claim that trial court denied defendant retained counsel of choice).

Because the appellant did not have a retained lawyer and did not alert the trial court to his desire to retain a specific lawyer, the trial court did not violate the appellant's right to counsel of his choice by appointing a lawyer for him. Thus, the trial court did not abuse its discretion in denying habeas relief.

The Rules of Evidence did not apply because there was no "hearing" to increase bail.

Finally, the appellant complains that the trial court failed "to consider and apply" the Rules of Evidence when it rearrested him and required him to give another bond. The appellant believes the trial court should not have considered the probable cause statement in assessing his bail because it would not have been admissible under the Rules of Evidence.

The Rules of Evidence do not apply to "bail proceedings other than hearings to deny, revoke or increase bail." TEX. R. EVID. 101(e)(3)(C). When a trial court follows the Article 17.09 procedure to rearrest a defendant and require him to give another bond, that may be a "bail proceeding," but it is not a hearing. There is no requirement of evidence, that the parties present arguments, that the parties be present, or that court even be in session.

The trial court can use the Article 17.09 procedure on its own motion at any time during the proceeding—"whenever, during the course of the action, the judge or magistrate finds that the bond is…insufficient." TEX. CODE CRIM. PROC. art. 17.09 § 3. That is, the trial court could, during a hearing that was not intended to be a "hearing to

increase bail," hear information that led it to conclude bail was insufficient.

That's how the trial court characterized its actions. The trial court said that at the appellant's first setting it reviewed the no-contact order and bail the hearing officer had set. (1 RR 4). During that "bail review hearing" it came to the conclusion the appellant's bail was insufficient so it ordered him rearrested and required him to give another bond. (2 RR 24). There is no indication this was intended to be a "hearing to increase bail." Instead, it was a proceeding to review the bail, after which the trial court exercised its statutory authority to rearrest the appellant and require him to give another bond. The Rules of Evidence did not apply.

If this Court were to apply the Rules of Evidence here, it would not be an unalloyed good for the appellant. While the Rules may have prohibited the prosecutor from reading the probable cause statement, they also would prohibit this Court from reversing the trial court without an objection. TEX. R. EVID. 103(a). There is no record of the hearing, but the appellant's evidence at his habeas hearing shows there was no objection. (1 CR 36-37).

In sum, there was no hearing to increase bail, thus the Rules of Evidence did not apply. Even if they should have applied, the lack of an objection means this matter would present nothing for review. The trial court did not err in denying habeas relief. This Court should overrule the appellant's second point.

Conclusion

The State asks this Court to affirm the trial court's denial of relief.

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